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 RICHARD W. WIEKING  
 CLERK, U.S. DISTRICT COURT,  
 NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

DMR

ELECTRONIC FRONTIER FOUNDATION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 U.S. DEPARTMENT OF TRANSPORTATION, )  
 )  
 Defendant. )

C 12 5581  
 Case No.:

COMPLAINT FOR INJUNCTIVE  
 RELIEF FOR VIOLATION OF THE  
 FREEDOM OF INFORMATION ACT,  
 5 U.S.C. § 552

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiff Electronic Frontier Foundation seeks the processing and release of records that Plaintiff requested from Defendant Department of Transportation's component Federal Aviation Administration concerning certifications and authorizations the agency issues to public entities interested in flying unmanned aircraft or drones.

PARTIES

2. Plaintiff Electronic Frontier Foundation (EFF) is a not-for-profit corporation established under the laws of the Commonwealth of Massachusetts, with offices in San Francisco, California and Washington, D.C. EFF is a donor-supported membership organization that works to inform policymakers and the general public about civil liberties issues related to technology and to

1 act as a defender of those liberties. In support of its mission, EFF uses the FOIA to obtain and  
2 disseminate information concerning the activities of federal agencies.

3 3. Defendant Department of Transportation (DOT) is a Department of the Executive  
4 Branch of the United States Government. DOT is an “agency” within the meaning of 5 U.S.C.  
5 § 552(f). The Federal Aviation Administration (FAA) is a component of Defendant DOT.

### 6 JURISDICTION

7 4. This Court has both subject matter jurisdiction over this action and personal  
8 jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552(a)(6)(C)(i).  
9 This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

### 10 VENUE AND INTRADISTRICT ASSIGNMENT

11 5. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C.  
12 § 1391(e).

### 13 FACTUAL ALLEGATIONS

#### 14 Use of Drones or Unmanned Aircraft in the United States

15 6. Unmanned aircraft or drones come in many shapes and sizes, from as large as a  
16 commercial airplane<sup>1</sup> to as small as a hummingbird.<sup>2</sup>

17 7. Unmanned aircraft are designed to carry various types of equipment that allow them  
18 to conduct highly sophisticated and almost constant surveillance, including video cameras, infrared  
19 cameras, heat sensors, and radar.<sup>3</sup> Some newer drones even carry super high resolution “gigapixel”

20 <sup>1</sup> See Associated Press, “Israel Unveils Drones Able to Hit Iran,” *N.Y. Times* (Feb. 21, 2010)  
21 <https://www.nytimes.com/2010/02/22/world/middleeast/22mideast.html> (noting Israel owns a fleet  
22 of drones, each the size of a Boeing 737); see also W.J. Hennigan, “Air Force buys souped-up,  
23 stealthy version of Predator drone,” *L.A. Times* (Dec. 31, 2011)  
24 [http://latimesblogs.latimes.com/money\\_co/2011/12/drone-general-atomics-air-force-.html](http://latimesblogs.latimes.com/money_co/2011/12/drone-general-atomics-air-force-.html) (noting  
25 the Air Force recently purchased a drone with a 66 foot wingspan and a top speed of 460 mph).

26 <sup>2</sup> W.J. Hennigan, “It’s a Bird! It’s a Spy! It’s Both,” *L.A. Times Blog* (Feb. 17, 2011)  
27 <http://articles.latimes.com/2011/feb/17/business/la-fi-hummingbird-drone-20110217>; Jason Paur,  
28 “Video: Hummingbird Drone Does Loop-de-Loop,” *Wired Danger Room Blog* (Feb. 18, 2011)  
<http://www.wired.com/dangerroom/2011/02/video-hummingbird-drone-can-perform-loops/>.

<sup>3</sup> Brian Bennett, “Police Employ Predator Drone Spy Planes on Home Front,” *L.A. Times* (Dec. 10,  
2011) <http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211> (describing  
Predator drones used to aid local law enforcement that contain “high-resolution cameras, heat  
sensors and sophisticated radar” as well as live video feed).

cameras that can “track people and vehicles from altitudes above 20,000 feet[,] . . . [can] monitor up to 65 enemies of the State simultaneously[, and] . . . can see targets from almost 25 miles down range.”<sup>4</sup> And one drone unveiled last year can crack Wi-Fi networks and intercept text messages and cell phone conversations—without the knowledge or help of either the communications provider or the customer.<sup>5</sup> Drones may also carry weapons.<sup>6</sup>

8. The market for unmanned aircraft in the United States is expanding rapidly, and companies, public entities, and research institutions are developing newer, faster, stealthier, and more sophisticated drones every year. According to a July 15, 2010 Fact Sheet produced by the FAA, “[i]n the United States alone, approximately 50 companies, universities, and government organizations are developing and producing some 155 unmanned aircraft designs.”<sup>7</sup> According to one market research firm, the UAV market is expected to double over the next decade to \$11.4 billion, with the United States accounting for 62% of research and development spending and 55% of procurement.<sup>8</sup> In 2011 alone, expenditures on unmanned aircraft were \$6.6 billion, with about

<sup>4</sup> Andrew Munchbach, “US Army’s A160 Hummingbird Drone-Copter to Don 1.8 Gigapixel Camera,” *Engadget* (Dec. 27, 2011) <http://www.engadget.com/2011/12/27/us-armys-a160-hummingbird-drone-copter-to-don-1-8-gigapixel-cam/>.

<sup>5</sup> See Andy Greenberg, “Flying Drone Can Crack Wi-Fi Networks, Snoop On Cell Phones,” *Forbes* (July 28, 2011) <http://www.forbes.com/sites/andygreenberg/2011/07/28/flying-drone-can-crack-wifi-networks-snoop-on-cell-phones/>.

<sup>6</sup> Eric Schmidt, “In the Skies Over Iraq, Silent Observers Become Futuristic Weapons,” *N.Y. Times* (April 17, 2003) <http://www.nytimes.com/2003/04/18/world/nation-war-military-aircraft-skies-over-iraq-silent-observers-become-futuristic.html>; Jane Perlez and Pir Zubair Shah, “Drones Batter Al Qaeda and Its Allies Within Pakistan,” *N.Y. Times* (April 4, 2010)

<https://www.nytimes.com/2010/04/05/world/asia/05drones.html>; David Axe, “New Armed Stealth Drone Heads to Afghanistan (And Maybe Iran, Too),” *Wired Danger Room Blog* (Dec. 13, 2011) <http://www.wired.com/dangerroom/2011/12/stealth-drone-afghanistan/>; Robert Stanton, “Texas Civil Libertarians Have Eye on Police Drones,” *Houston Chronicle* (Oct. 31, 2011)

<http://www.chron.com/news/houston-texas/article/Texas-civil-libertarians-have-eye-on-police-drones-2245644.php>; Stephen Dean, “New Police Drone Near Houston Could Carry Weapons,” *Click2Houston.com* (Nov. 10, 2011) <http://www.click2houston.com/news/New-Police-Drone-Near-Houston-Could-Carry-Weapons/-/1735978/4717922/-/59xnnz/-/index.html>.

<sup>7</sup> FAA, *Fact Sheet: Unmanned Aircraft Systems (UAS)*, 1, available at: [http://www.faa.gov/about/initiatives/uas/media/UAS\\_FACT\\_Sheet.pdf](http://www.faa.gov/about/initiatives/uas/media/UAS_FACT_Sheet.pdf).

<sup>8</sup> Lucintel, “Growth Opportunities in Global UAV Market” at p. 3 (March 2011), available at [www.lucintel.com/LucintelBrief/UAVMarketOpportunity.pdf](http://www.lucintel.com/LucintelBrief/UAVMarketOpportunity.pdf) (last visited Oct. 30, 2012); see also The Teal Group, “World Unmanned Aerial Vehicle Systems—Market Profile and Forecast 2012 Edition,” Table of Contents and Executive Summary, 1 available at <http://dl.dropbox.com/u/65542825/TGCTOC/sample-wuavs.pdf> (last visited Oct. 30, 2012).

1 \$4.3 billion spent in the United States alone.<sup>9</sup> The market for these systems is only expected to  
 2 increase: some have forecast that by the year 2018 there will be “more than 15,000 [unmanned  
 3 aircraft systems] in service in the U.S., with a total of almost 30,000 deployed worldwide.”<sup>10</sup>

4 9. In the past, unmanned aircraft have been used almost exclusively by military and  
 5 security organizations.<sup>11</sup> However, that is changing rapidly. In December 2011, U.S. Customs and  
 6 Border Protection (CBP) purchased its ninth drone, and it uses these drones inside the United  
 7 States to patrol the U.S. Borders.<sup>12</sup> In the last year or so, interest has also grown in using unmanned  
 8 aircraft domestically for a broad range of other uses, including “aerial photography, surveying land  
 9 and crops, [and] monitoring forest fires and environmental conditions.”<sup>13</sup>

10 10. Drones are also increasingly being used for routine state and local law enforcement  
 11 activities as well, from catching cattle rustlers<sup>14</sup> and drug dealers<sup>15</sup> to finding missing persons.<sup>16</sup>  
 12 Some within law enforcement have even proposed using drones for recording traffic violations.<sup>17</sup>

### 13 Regulation of Drones

14 11. The FAA regulates the operation of unmanned aircraft in the United States. The  
 15 agency does so, both informally for the use of unmanned aircraft on a recreational basis where  
 16  
 17

18 <sup>9</sup> *Id.*

19 <sup>10</sup> Joint Planning and Development Office, “Operating Unmanned Aircraft Systems in 2018 and  
 20 Beyond: NextGen Challenges and Opportunities” (Jan. 4 2011) *available at*  
 21 <http://www.jpdo.gov/newsarticle.asp?id=146> (citing The Teal Group, “World Unmanned Aerial  
 Vehicle Systems, Market Profile and Forecast 2009-2010”).

22 <sup>11</sup> See FAA, *Fact Sheet* at 1.

23 <sup>12</sup> “CBP Receives Fourth Predator-B in Arizona: Agency Now Operates 9 Unmanned Aircraft,”  
 24 *U.S. Customs and Border Protection* (Dec. 27, 2011) [http://www.cbp.gov/xp/cgov/newsroom/  
 news\\_releases/national/12272011.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/12272011.xml).

25 <sup>13</sup> FAA, *Fact Sheet* at 1.

26 <sup>14</sup> Bennett, “Police Employ Predator Drone Spy Planes on Home Front,” *supra*.

27 <sup>15</sup> Peter Finn, “Domestic Use of Aerial Drones by Law Enforcement Likely to Prompt Privacy  
 28 Debate,” *Washington Post* (Jan. 23, 2011) [http://www.washingtonpost.com/wp-  
 dyn/content/article/2011/01/22/AR2011012204111.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204111.html).

<sup>16</sup> Robert Stanton, “Texas Civil Libertarians Have Eye on Police Drones,” *supra*.

<sup>17</sup> Finn, “Domestic Use of Aerial Drones by Law Enforcement Likely to Prompt Privacy Debate,”  
*supra* (noting that a “senior officer in Houston then mentioned to reporters that drones might  
 ultimately be used for recording traffic violations”).

1 operations are limited to flights “below 400 feet above ground level and away from airports and air  
2 traffic,”<sup>18</sup> and on a formal basis for flights within the National Airspace System.<sup>19</sup>

3 12. Public entities—including government agencies, local law enforcement, and state  
4 universities—that wish to fly an unmanned aircraft in civil airspace must seek from the FAA a  
5 “Certificate of Authorization or Waiver (COA).”<sup>20</sup> The Washington Post reported in January 2011  
6 that “[a]s of Dec. 1, [2010,] according to the FAA, there were more than 270 active authorizations  
7 for the use of dozens of kinds of drones. Approximately 35 percent of these permissions are held  
8 by the Department of Defense, 11 percent by NASA and 5 percent by the Department of Homeland  
9 Security[.]”<sup>21</sup>

10 13. The FAA is working to further integrate unmanned aircraft into the national  
11 airspace. The “FAA Modernization and Reform Act of 2012,” Pub. L. 112-95, signed into law on  
12 February 14, 2012, requires the FAA to do several things to expand the number of drones flown by  
13 public entities. For example, it has required the Secretary of Transportation to simplify the process  
14 for issuing COAs to public entities, including mandating an expedited review process and allowing  
15 government public safety agencies to operate drones weighing 4.4 pounds or less without a COA.  
16 *Id.* Sec. 334(c). It also requires the Secretary of Transportation to issue “guidance regarding the  
17 operation of public unmanned aircraft systems” by November 10, 2012. This “guidance” must  
18 discuss ways to further expedite the issuance of COAs to public entities, *id.* Sec. 334(a)(1), and  
19 public entities’ responsibilities when operating drones without a COA. *Id.* Sec. 334(a)(4).

20 **Related Case—*EFF v. Dept. of Transportation*—Case No. 12-00164**

21 14. On April 13, 2011, Plaintiff faxed a FOIA request to the FAA requesting all agency  
22 records (including, but not limited to, electronic records) discussing active and expired Certificates  
23

24 <sup>18</sup> See FAA Advisory Circular 91-57, available at [http://rgl.faa.gov/Regulatory\\_and\\_Guidance\\_Library/rgAdvisoryCircular.nsf/0/1ACFC3F689769A56862569E70077C9CC](http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/0/1ACFC3F689769A56862569E70077C9CC) (last visited Oct. 30, 2012).

25 <sup>19</sup> *FAA Fact Sheet* at 1.

26 <sup>20</sup> See FAA, “Unmanned Aircraft Systems (UAS): Certifications and Authorizations,” available at  
27 <http://www.faa.gov/about/initiatives/uas/cert/> (last visited Oct. 30, 2012).

28 <sup>21</sup> Finn, “Domestic Use of Aerial Drones by Law Enforcement Likely to Prompt Privacy Debate,”  
*supra*.

1 of Authorization or Waivers issued to public and private entities as well as COA applications that  
2 were disapproved.

3 15. The FAA assigned this FOIA request FAA FOIA Request No. 2011-5126.

4 16. After the FAA failed to respond to Plaintiff's FOIA request, EFF filed suit on  
5 January 10, 2012 in this District. The case is assigned to Judge Claudia Wilken as Case No. 12-  
6 00164.

7 17. As a result of the lawsuit, the FAA released a list of public entities that had applied  
8 for, been issued or been disapproved for a Certificate of Authorization.<sup>22</sup> The list the FAA released  
9 included approximately 60 entities.

10 18. FAA has also been releasing records related to the requested COA files on an  
11 ongoing basis.

12 **Plaintiff's Second FOIA Request to the FAA (The Subject of this Lawsuit)**

13 19. On July 19, 2012, at a Congressional hearing on the domestic use of drones,  
14 Congressman Michael McCaul revealed that "there are about 200 active Certificates of  
15 Authorization issued by the Federal Aviation Administration to over 100 different entities, such as  
16 law enforcement departments and academic institutions, to fly drones domestically."<sup>23</sup> Similarly,  
17 Gerald Dillingham, director of Physical Infrastructure Issues at the Government Accountability  
18 Office (GAO), stated in written testimony that "[b]etween January 1, 2012 and July 17, 2012, FAA  
19 had issued 201 COAs to 106 federal, state, and local government entities across the United States,  
20 including law enforcement entities as well as academic institutions."<sup>24</sup>

21  
22  
23 <sup>22</sup> See Jennifer Lynch, "FAA Releases Lists of Drone Certificates—Many Questions Left  
24 Unanswered," *EFF* (Apr. 19, 2011) [https://www.eff.org/deeplinks/2012/04/faa-releases-its-list-  
drone-certificates-leaves-many-questions-unanswered](https://www.eff.org/deeplinks/2012/04/faa-releases-its-list-drone-certificates-leaves-many-questions-unanswered).

25 <sup>23</sup> See Terence Jeffrey, "FAA Has Authorized 106 Government 'Entities' to Fly Domestic Drones,"  
*CNSNews.com* (July 20, 2012).

26 <sup>24</sup> Gerald Dillingham, "Unmanned Aircraft Systems: Use in the National Airspace System and the  
27 Role of the Department of Homeland Security," *Testimony Before Subcommittee on Oversight,  
Investigations, and Management, Committee on Homeland Security, House of Representatives*  
28 (July 19, 2012) [http://homeland.house.gov/sites/homeland.house.gov/files/Testimony-  
Dillingham.pdf](http://homeland.house.gov/sites/homeland.house.gov/files/Testimony-Dillingham.pdf).



20. In light of the difference between the number of public entities on the list released by the FAA to EFF in April 2012 (approximately 60) and the number of entities mentioned by Congressman McCaul and GAO Director Dillingham at the Congressional hearing on July 19, 2012 (approximately 100), on August 21, 2012, Plaintiff submitted via fax a second FOIA request to the FAA requesting all agency records (including, but not limited to, electronic records) dated between the date of the start of the search for FAA FOIA Request No. 2011-5126 and the present discussing, concerning, or reflecting:

- (1) any active certificates or authorizations issued by the FAA to public entities for any type of drone or unmanned aircraft (UA)<sup>25</sup> and all corresponding agency records;
- (2) any expired certificates or authorizations issued by the FAA to public entities for any type of drone or UA and all corresponding agency records;
- (3) any applications for UA certificates or authorizations that were submitted by public entities and denied or disapproved by the FAA, and all corresponding agency records.

21. Plaintiff further requested that, where available, the records should include, but were not limited to, the government agency to which the UA authorization was issued, the altitude at which the agency anticipated the UA to fly, the geographic area in which the agency anticipated using the UA, the stated purpose for which the agency sought UA authorization, and the type or model of UA for which the agency sought authorization.

22. Plaintiff also offered that if the FAA wished to produce a list of entities similar to that produced in response to FAA FOIA Request No. 2011-5126 prior to producing all agency records, EFF would consider narrowing the scope of this request to certain public entities and therefore reduce the burden on the agency.

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<sup>25</sup> "Public UA" is defined as an unmanned aircraft "that is only for the United States government or owned and operated by the government of a state, the District of Columbia, or a territory or possession of the U. S. or a political subdivision." *See*, Unmanned Aircraft, Questions and Answers, Federal Aviation Administration, *available at* [http://www.faa.gov/about/initiatives/uas/uas\\_faq/](http://www.faa.gov/about/initiatives/uas/uas_faq/).

23. On information and belief, FAA received Plaintiff's request letter, described in paragraphs 20-22, on August 21, 2012.

24. By letter dated August 24, 2012, FAA acknowledged receipt of Plaintiff's FOIA request and assigned it Request Number 2012-7506.

25. Despite FAA's acknowledgement, the FAA has yet to process and release records responsive to EFF's FOIA request. As such, the FAA has exceeded the generally applicable twenty-day deadline for the processing of any FOIA request.

26. Plaintiff has exhausted the applicable administrative remedies with respect to its FOIA request referenced herein.

27. Defendant has wrongfully withheld the requested records from Plaintiff.

### CAUSE OF ACTION

## Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records

28. Plaintiff repeats and realleges paragraphs 1-27.

29. Defendant has wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for the processing of FOIA requests.

30. Plaintiff has exhausted the applicable administrative remedies with respect to Defendant's wrongful withholding of the requested records.

31. Plaintiff is entitled to injunctive relief with respect to the release and disclosure of the requested documents.

**REQUESTED RELIEF**

WHEREFORE, Plaintiff prays that this Court:

1. order Defendant and its component to disclose immediately the requested records in their entirety;
2. order Defendant and its component to waive all fees associated with the processing and release of the requested records;
3. award Plaintiff its costs and reasonable attorneys fees incurred in this action; and
4. grant such other relief as the Court may deem just and proper.



1 DATED: October 29, 2012

Respectfully submitted,

2  
3 By: 

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